BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI L. STETZEL, Claimant, v. YELLOWSTONE TRUCKING, Employer, and INSURANCE COMPANY OF THE WEST, Surety, Defendants.	)	**IC 02-005827** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed November 10, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene, Idaho, on May 12, 2005. Claimant was present and represented by Thomas B. Amberson of Coeur d'Alene. Thomas V. Munson of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record was held open for the taking of two post-hearing depositions. The parties submitted post-hearing briefs and this matter subsequently came under advisement on August 17, 2005, and is now ready for decision.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether and to what extent Claimant is entitled to the following benefits:

   (a) Medical;

   (b) Total temporary (TTD) or total partial (TPD) disability;

(c) Permanent partial impairment (PPI);[1] and

(d) Permanent partial disability (PPD).

2. Whether Claimant's condition is due in whole or in part to a pre-existing or subsequent injury or disease not work-related;

3. Whether Claimant's PPD, if any, should be apportioned pursuant to Idaho Code § 72-406;

4. Determination of Claimant's average weekly wage;

5. Whether any compensation awarded should be reduced pursuant to Idaho Code § 72-435;

6. Whether Defendants are entitled to a credit for an overpayment of TTD benefits; and,

7. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Defendants' unreasonable denial of certain benefits.

CONTENTIONS OF THE PARTIES

Claimant contends she is entitled to further medical care for a failed back surgery resulting from an industrial injury. She further contends that she is entitled to the PPI rating assigned by her treating physician rather than the one assigned by Defendants' designated examiners. She also alleges she is entitled to additional TTD benefits. Moreover, she is entitled to PPD because her injury has made it impossible for her to return to work as a long-haul trucker and there are no jobs available to her within her restrictions within a reasonable distance from her residence in Superior, Montana. Finally, she contends that she is entitled to an award of

[1] Defendants object to the inclusion of PPI benefits as an issue because the Referee failed to mention PPI as an issue at hearing. However, PPI was listed as an issue in the Notice of Hearing and because there have been two PPI ratings given and one rating involved a contested apportionment for pre-existing conditions, if there was no issue regarding PPI, it would be impossible to determine which rating is the appropriate one in this case. Further, the Referee's failure to mention PPI as an issue at hearing was merely inadvertence and not intentional.

attorney fees for Surety's failure to pay for one level of her two-level back surgical fusion and for failing to authorize a post-surgical CT scan requested by her treating physician.

Defendants contend that they relied upon credible medical evidence in denying approval for the lower level of a two-level fusion, as there was no pathology at the level in question relating the need for a fusion to her industrial back injury. Further, they also denied the request for the CT scan based on credible medical evidence. Defendants ask the Commission to adopt the PPI rating assigned by their independent panel as the one being the most reasonable. They further contend that based on their panel's report, Claimant is not entitled to any further medical treatment and the treatment being recommended is unreasonable and would be of no benefit. Defendants also assert that Claimant's current problems stem from her obesity, smoking, and emotional issues, and any benefits awarded should be reduced accordingly. Defendants claim they are entitled to a credit for an overpayment of certain TTD benefits based on an inaccurate average weekly wage. Claimant has been released to return to work as a team long-haul trucker and even if she does not return to that occupation, she is highly qualified in various sedentary and light duty positions that are readily available in Missoula, an hour's commute away. Finally, Claimant is currently under-employed as the proprietor of a flower and gift shop that is losing money and is entitled to no PPD above her PPI.

Claimant did not file a Reply Brief.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing;
2. Claimant's Exhibits A-C and E-T admitted at the hearing;
3. Defendants' Exhibits A-Y; and,

4. The post-hearing depositions of Mark Schwager, with one exhibit, and Al Kuykendall, M.D., both taken by Defendants on May 16, 2005.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 47 years of age and resided with her husband in Superior, Montana, at the time of the hearing. She and her husband were employed as team long-haul truck drivers for Employer.

2. On March 28, 2002, while securing a load in Roanoke, Virginia, Claimant injured her lower back and right leg while placing supports in a curtain van trailer. Rather than immediately seek medical attention, Claimant and her husband drove back to their home in Superior.

3. Claimant first sought medical treatment on March 31, 2002, when she presented to the emergency room at a hospital in Superior complaining of right lower back pain radiating into her right hip and right leg numbness. She was given medications and a lumbar MRI was ordered that revealed: "There is evidence of a transitional vertebra. There is [*sic*] rather severe focal degenerative changes at the L3-4 level with an annular tear and moderate disc protrusion that is [*sic*] producing narrowing of the neural foramen on the right side. There is also degenerative change at the L4-5 level with a moderate central bulging of the disc noted." Defendants' Exhibit G, p. 6. In addition to medications, Claimant was also prescribed physical therapy that was not successful.

4. Claimant's treating physician in Superior referred her to Richard A. A. Day, M.D., a neurosurgeon in Missoula, Montana, who she first saw on April 9, 2002. When

conservative measures failed, Dr. Day performed an L3-4, L4-5 decompressive laminectomy followed by an L3-4, L4-5 bilateral radical discectomy and posterior lumbar fusion on August 6, 2002. Post-operatively, Claimant was offered physical therapy, medications, and steroid injections; however, it was ultimately determined that her two-level fusion had failed.

DISCUSSION AND FURTHER FINDINGS

Medical benefits:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

5. The Surety in this matter approved the surgery at the L3-4 level but not at the L4-5 level. They based their denial of the second level fusion on the reports of Al H. Kuykendall, M.D., a retired Boise neurosurgeon. Dr. Kuykendall opined that there was no

pathological evidence that the L4-5 level was injured in Claimant's accident but was, in fact, the result of a pre-existing degenerative condition. He briefly summarized his conclusion that the L4-5 surgery was not related to her accident in his deposition:

> The clinic history did not support diagnosis of pathology causing pain at that level. The diagnostic studies did not support a diagnosis that would justify pain at that level. And for those reasons, I did approve, and my conversation with Dr. Day, the level that was operated on, but I did not approve the procedure at L4-5.

Dr. Kuykendall Deposition, p. 14.

6. Dr. Day was not deposed, but it is clear from his medical records that he decided to proceed to the L4-5 level, not due to his concerns about any pathology at that level as such, but due to his concerns about the structural integrity of the fusion because Claimant's L5-S1 level appeared radiographically to be congenitally fused. Dr. Day did express concern that an L3-L5 fusion may eventually transfer stresses to the upper lumbar spine and may not be curative of all her low back and lumbar spine symptoms. *See,* Defendants' Exhibit H, p. 16. As Dr. Day explained in his August 6, 2002, Operative Report: "Arthrodesis at L4-5 was recommended since she had a sacrolized S1 segment and was fused to the sacrum at that level and I did not advise performing a laminectomy between two fused vertebral segments because of the risks of earlier delayed instability." Claimant's Exhibit H, p. 51.

7. Dr. Kuykendall had a telephone conversation with Dr. Day on July 29, 2002, wherein Dr. Day also expressed his opinion that it was necessary to extend the fusion through L-5 due to concerns of stress and an increase in degeneration at the L4-5 level. Dr. Day agreed with Dr. Kuykendall that such a fusion could also cause increased stress and degeneration at the L2-3 level on motion. In any event, without Claimant's accident causing the problems at L3-4, it is doubtful that consideration would have been given to back surgery at any level. While Dr. Kuykendall disagrees with Dr. Day's decision to fuse L4-5, it was, nonetheless, Dr. Day's

call based on his examination of Claimant and the various diagnostic studies. Dr. Day **required** the procedure he performed, albeit apparently unsuccessfully, and the Referee cannot find that the procedure was unreasonable.

8. The Referee finds that Defendants are liable for the L4-5 fusion and all medical bills associated therewith.

CT myelogram:

9. Dr. Day and John M. McNulty, M.D., an orthopedic surgeon to whom Claimant's attorney sent her for a PPI rating, have both recommended a CT myelogram to diagnostically assess the cause of Claimant's L5 radiculopathy. Surety has denied this request based on Dr. Kuykendall's opinion that the L4-5 fusion was not due to her accident. On April 28, 2003, Dr. Day authored the following letter to Surety:

> Over the past several months we have been trying to obtain a CT myelogram on patient Lori Stetzel in order to evaluate the result of her two level lumbar spinal decompression and fusion. To date you have refused coverage for this study.
>
> On exam today the patient appeared emotionally exhausted from her battles with your department and recent refusal to approve a CT myelogram. **In my opinion this myelogram is vital to medical decision making and delay if [*sic*] obtaining this study is interfering with her care and progress of her treatment.**
>
> **I strongly advise** for you to provide use [*sic*] with your immediate approval for this study so that this patient can be adequately assessed and appropriate treatment recommendations made.

Defendants' Exhibit H, p. 35. Emphases added.

10. Dr. Day has plainly and unequivocally and in no uncertain terms requested treatment he requires to meaningfully evaluate the potential cause or causes of Claimant's failed back fusion and to recommend further treatment if necessary. Because the Referee has found both levels of Claimant's fusion to be work-related, the Referee further finds that the CT

myelogram recommended by Claimant's treating physician to be reasonable and Defendants are liable therefor.

Dr. Cheatle:

11. Dr. Day referred Claimant to Martin D. Cheatle, Ph.D., in Missoula for pain control. Dr. Kuykendall opined in his May 2, 2005, report that Dr. Cheatle's treatment, although not entirely successful, was appropriate. To the extent that Surety has not paid for Dr. Cheatle's treatment, it is found to be liable for any unpaid fees and fees to be incurred in the future should his treatment continue.

TTD/TPD benefits:

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 614, 621 (2001) (citations omitted).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout his or her period

of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg, Id*.

Claimant contends she is entitled to TTD benefits from the time when Surety terminated those benefits based on an IME performed on May 12, 2003, until she stopped treating at the Montana Spine Center on March 23, 2005. Defendants respond that Claimant is not entitled to any further TTD benefits because she voluntarily chose to open a flower/gift shop before she was declared medically stable by their IME panel and was/is not in a period of recovery.

12. Claimant has had a slow and protracted period of recovery from what has now been accepted as a failed back surgery. Even though the IME panel released Claimant to return to work as a team driver for Employer, there is some doubt regarding whether they would re-hire her. Claimant admits she never contacted them but according to ICRD consultant Dirk Darrow, who was working with Claimant, such contact might have been futile: "The employer indicated that it was not likely for the claimant to have a position to return to since the company's most recent merger. The new parent company considers the claimant's position to be terminated." Defendants' Exhibit R, p. 16. Dr. Day took Claimant off work on April 28, 2003, pending the approval by Surety of a CT myelogram to document the technical result of her surgery. Then on June 20, 2003, Dr. Day noted that Claimant did not wish to pursue truck driving and he supported ". . . that light duty work that [Claimant] has currently carved out for herself is probably in her best interest." Defendant's Exhibit H, p. 36. Under these circumstances, the Referee finds that Claimant is not entitled to any further TTD benefits.

Average weekly wage:

13. Claimant contends her average weekly wage at times pertinent hereto was $483.73 based on her Complaint. *See,* Claimant's Opening Brief, p. 20. However, the Complaint lists her average weekly wage as $438.73. *See,* Complaint filed October 23, 2003. The Referee finds Claimant's average weekly wage to be $438.73 as is reflected in her Complaint. *See,* Hearing Transcript, p. 90.

Overpayment of TTD benefits:

14. Defendants contend that Claimant was overpaid $10,747.73 in TTD benefits based on Claimant's admitted $483.72 average weekly wage per her opening brief. Apparently, Defendants paid Claimant based on the total earnings of the truck she and her husband drove. However, at hearing Claimant testified that in actuality, she was paid for one-half of the total miles driven rather than the total miles. Claimant did not respond to Defendants' argument. There being no evidence to the contrary, the Referee finds that Claimant was overpaid TTD benefits and Defendants are allowed a credit for that overpayment. However, the amount of overpayment should be adjusted to reflect an average weekly wage of $438.73.

Permanent partial impairment (PPI):

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining

impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

15. There have been two PPI ratings issued in this case. The first was a 13% whole person PPI assigned by Dr. Kuykendall and Richard Wilson, M.D., a neurologist, as the result of a Defense IME conducted on May 12, 2003. They utilized the range of motion method of the AMA *Guides to the Evaluation of Permanent Impairment*, 5th Edition (AMA *Guides*) and apportioned 50% of the 13% to the "unauthorized surgery" at L4-5. John M. McNulty, M.D., an orthopedic surgeon assigned the second rating, on May 19, 2003, at the request of Claimant's attorney. Dr. McNulty utilized the DRE method of the AMA *Guides* and concluded Claimant suffered a 28% whole person impairment with no apportionment.

16. Because the Referee has previously found that Claimant's fusion at L4-5 was reasonably related to her industrial accident, he further finds that the 13% whole person PPI found by the Defense panel is not apportionable. Further, based on Dr. Kuykendall's deposition testimony that it really does not make much difference whether one utilizes the ROM or DRE method, the Referee finds it reasonable to average the 13% and 28% for a 20.5% whole person PPI rating. This is a minimum rating which could increase depending upon the results of Claimant's CT myelogram and the treatment, if any, recommended based thereon. The Referee is aware that Claimant experienced back problems in 1991 and 1995 but her condition was never rated for PPI and she received no treatment for her back since 1995; therefore, apportionment for that pre-existing "condition" is not appropriate.

Permanent partial disability:

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a

determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

17. Claimant graduated from high school in 1974 and took some college courses in management (51 credits) but never received her degree. She did, however, receive a certificate as a legal secretary but never worked as such. Her work history can be summarized as follows: professional truck driver; cargo claims manager in the trucking industry; administrative assistant/claims investigator in the trucking industry; U.S. West Direct communications analyst/office administrator; owner/manager of a cargo claims investigation and packaging evaluation service; and, office manager/administrative assistant to the terminal manager for a trucking company. She has 16 years experience in virtually every aspect of the trucking industry. Claimant lists some of her qualifications in her resume (Defendants' Exhibit R-(1)) as: extensive experience in all aspects of office administration, office management, bookkeeping, and personnel. Demonstrated interpersonal and public relations skills with excellent oral and written communications abilities. Customer focused with experience in customer service using quality tools to improve processes, set priorities, and meet quality standards.

18. Drs. Kuykendall and Wilson opine that Claimant can return to work as a team truck driver with a lifting restriction of 40 pounds occasionally. Dr. Day would not release Claimant to return to work as a truck driver without the results of a CT scan he had requested and which Surety refused to authorize. He opined that the light duty work performed by Claimant in her flower/gift shop, ". . . is probably in her best interest." Defendants' Exhibit H, p. 36. Dr. McNulty restricted Claimant as follows:

> The patient is unable to return to her previous employment as a truck driver. She will be able to perform sedentary-type work only for short periods of time. She will require frequency [*sic*] changes of position and should have a 10-lb rare maximum lifting restriction and a 2-lb frequent lifting restriction. She currently

> owns a flower shop, where she receives help with the lifting and essentially performs sedentary-type work, with the ability to rest and change positions frequently. This type of employment appears suitable for her.

Claimant's Exhibit J, p. 84.

19. Claimant worked with ICRD consultant Dirk Darrow from May 2002 until he closed her file in July 2003. Mr. Darrow sent a job description for a truck driver to Drs. Kuykendall, Wilson, and Day. Dr. Kuykendall indicated Claimant could return to work as a team truck driver with a 40-pound lifting restriction. Dr. Day indicated the truck driver position was not appropriate and further indicated "no work" pending the completion of the CT myelogram discussed above. Based on his opinion that Claimant had been released to her time-of-injury occupation and because Claimant had purchased the flower/gift shop, Mr. Darrow closed his file.

20. Defendants retained Mark Schwager, a vocational rehabilitation counselor residing in Kalispell, Montana, to assist them with vocational issues. For reasons unknown, Claimant refused to meet with Mr. Schwager, causing Defendants to file a motion to compel her to meet with him. This Referee denied the motion on the ground that he was aware of no statutory or judicial authority requiring such a meeting. Nonetheless, the Referee, absent some reasonable explanation for Claimant's refusal to meet with Mr. Schwager, finds that such failure has prevented Defendants from exploring viable employment opportunities for Claimant in Superior and exhibits a desire on her part to, as Defendants characterize it, remain underemployed.

21. In any event, Mr. Schwager was able to provide opinions regarding Claimant's employability in both a report and in deposition. Mr. Schwager's opinion regarding Claimant's employability is summarized in his deposition testimony as follows:

> Q. (By Mr. Munson): In your final page of your report under "Wage Analysis," you make the statement that, "Mrs. Stetzel is significantly underemployed given her educational background, work experience, and residual skills." Do you see that?
>
> A. Yes.
>
> Q. Could you explain for the benefit of [*sic*] Commission how you reached that conclusion?
>
> A. It's my understanding that Ms. Stetzel is engaged in self-employment as a florist at the present time. And I believe the tax records for the last two years show a loss of income. It's my opinion that statement there that should she obtain employment in Missoula, which would be a reasonable compute [*sic*], she could make anywhere from $10 to $12 starting out, which would be more in tune with her job skills and education and work background.

Schwager Deposition, pp. 19-20.

22. Mr. Schwager used the Missoula area as Claimant's labor market and conceded that Superior, population about 1,000, and Mineral County have a high unemployment rate and jobs paying between $10 to $12 an hour were "few and far between." Missoula is about 60 miles from Superior and takes from between 45 minutes to an hour-and-a-half to drive depending on the weather and how many times Claimant has to stop and get out.

There is no question that Claimant is underemployed in her flower/gift shop as is evidenced by her work history and transferable skills. The question is whether Missoula is within a "reasonable geographic area" so as to be considered within Claimant's labor market. In *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 870 P.2d 1292 (1994), the Court was called upon to provide a definition of "reasonable geographic area." The Court concluded that the phrase refers to the area surrounding the claimant's home at the time of the hearing. The Court provided no assistance in defining "the area surrounding the claimant's home." Although the claimant lived in Priest River at the time of his injury, he was living in Missoula at the time of the hearing and the Commission correctly considered the Missoula labor market. In *Combs v. Kelly Logging*, 115 Idaho 695, 769 P. 2d 572 (1989), the claimant worked in Missoula during the

week and returned to his home in Salmon on weekends. He was injured while working in Missoula. The Commission included both the Missoula and Salmon labor markets as "reasonable geographic areas" and denied claimant odd-lot status because he had failed to look for work in Missoula, which is 129 miles from Salmon. The Court held that an injured worker is not required to move from his or her home to find work, rather, the worker must only seek work a reasonable distance from his or her home. The Court concluded that Missoula was not a reasonable distance from claimant's long-time home in Salmon.

23. Here, there is no dispute that Claimant resided in Superior not only at the time of the hearing, but at the time of her injury as well. So, the question remains whether or not Missoula, some 60 miles from Superior, is within a reasonable geographic area within which Claimant should be required to commute. Claimant testified that she has not looked for any jobs in Superior (because there are no jobs) or Missoula (she cannot drive that far). However, Claimant's testimony that she cannot drive to Missoula is overstated in that many of her medical care providers were in Missoula and she visited them many times and she also testified that it took her up to an hour and a half to drive to Missoula as she had to stop and get out. She also testified that she makes deliveries associated with her flower/gift shop within a 125-mile radius of Superior. Nonetheless, Dr. McNulty has indicated (and Claimant agrees) that she needs to frequently change positions. Finally, Claimant suffers from chronic pain problems and testified that she has never been entirely pain-free since her accident, and it does bother her to drive. Under the facts of this case, the Referee finds that Missoula is not in a reasonable geographic area from Claimant's home in Superior and, thus, the Missoula labor market should not be considered.

24. There is scant evidence in the record regarding the employment situation in or near Superior. Claimant testified that there are no jobs in Superior, so she opened up a so far non-profitable flower/gift shop. She refused to meet with Mr. Schwager to even discuss alternative employment in the Superior vicinity or elsewhere, nor has she sought work. If there are no jobs in Superior, one is left to wonder how Claimant expects to ever make a living in her present circumstance, and she testified that she has no plans to leave Superior. In any event, Claimant, for whatever reason, has decided to take herself out of whatever labor market is in or near Superior to engage in a business she apparently enjoys, albeit, for which she is clearly overqualified and underpaid. Claimant bears the burden of proving disability above impairment. The Referee finds that a pre- and post-injury earnings comparison is not an accurate reflection of Claimant's disability, in that Claimant has chosen to be self-employed in an endeavor that has, so far, created no income. While a vocational expert is not required, here, the Referee is provided little information regarding Claimant's alleged disability above impairment, and to assign a rating would require an exercise in speculation. In light of the finding that Claimant is entitled to further diagnostic testing by way of a CT myelogram, the Referee recommends that the issue of PPD be reserved pending the results of the myelogram and further treatment, if any, based thereon. If Claimant's chronic pain disorder can be treated and improved, the extent of her PPD, if any, may be better assessed. Based on this finding, the issue of apportionment pursuant to Idaho Code § 72-406 is moot.

Reduction of benefits:

Defendants contend that Claimant's benefits should be suspended or reduced pursuant to Idaho Code § 72-435 that provides: If an injured employee persists in unsanitary or

unreasonable practices which tend to imperil or retard his recovery the commission may order the compensation of such employee to be suspended or reduced.

25. Defendants contend Claimant's smoking of cigarettes has contributed to her chronic pain disorder and has impeded her recovery, and rely on the testimony of Dr. Kuykendall in support of their contention. Claimant contends she followed Dr. Day's orders and quit smoking two weeks before her surgery. The Referee is mindful that most, if not all, physicians are aware of the risks involved in smoking and so inform their patients. However, there is no evidence in this case regarding the quantification of how Claimant's smoking has imperiled or retarded her recovery, and the Referee is disinclined to recommend a suspension or reduction in her benefits based on this record.

Attorney fees:

Idaho Code § 72-804 provides for an award of attorney fees if an employer and/or its surety contested a claim for compensation without reasonable grounds or neglected or refused within a reasonable time after receipt of a written claim for compensation to pay the compensation to which a claimant is entitled. Attorney fees are not granted to a claimant as a matter of right under the Idaho workers' compensation law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976). The decision that grounds exist for awarding a claimant attorney fees is a factual determination resting with the Commission.

26. Claimant contends she is entitled to an award of attorney fees for Surety's unreasonable denial of her surgery at L4-5 and for failing to approve the CT myelogram requested by Drs. Day and McNulty. While ultimately found to be less persuasive than the

opinions of Dr. Day, nonetheless, Surety had the opinions of Drs. Kuykendall and Wilson upon which to base their denials and an award of attorney fees is not appropriate here.

CONCLUSIONS OF LAW

1. Claimant is entitled to payment of or reimbursement for all costs associated with her L4-5 fusion.

2. Claimant is entitled to the CT myelogram requested by Drs. Day and McNulty and whatever reasonable treatment recommendations, if any, arising from the results of the scan.

3. Claimant is entitled to payment of or reimbursement for Dr. Cheatle's treatment.

4. Claimant is not entitled to further TTD benefits.

5. Claimant's average weekly wage is $438.73.

6. Defendants are entitled to a credit for the overpayment of TTD benefits based on Claimant's average weekly wage of $438.73.

7. Claimant is entitled to a whole person PPI rating of 20.5%.

8. The issue of Claimant's entitlement to PPD benefits is reserved.

9. The issue of apportionment pursuant to Idaho Code § 72-406 is moot.

10. Claimant's benefits will not be suspended or reduced pursuant to Idaho Code § 72-435.

11. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this _2nd_ day of November, 2005.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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THOMAS MUNSON
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